UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
X----------X

MICHAEL HARRELL, SUSAN CALVO, JOHN PETERS PROFESSIONAL LIMOUSINES, INC., JACKLYN RESTREPO and PEDRO CAMACHO individually and on behalf of all others similarly situated,

14 Civ 7246 (VEC)

Plaintiffs,

ORAL ARGUMENT REQUESTED

-against-

THE CITY OF NEW YORK, MEERA JOSHI, DAVID YASSKY and RAYMOND SCANLON,

Defendants.
X----------X

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Daniel L. Ackman
Law Office of Daniel L. Ackman
222 Broadway, 19th Floor
New York, NY 10013
(917) 282-8178
d.ackman@comcast.net

Andrew St. Laurent
Harris, O'Brien, St. Laurent & Chaudhry LLP
111 Broadway, Suite 1502
New York, NY 10006
Tel: (646) 248-6010
andrew@harrisobrien.com

Co-Counsel for Plaintiffs

January 7, 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

PRELIMINARY STATEMENT

As a matter of policy and practice, the New York City Taxi and Limousine Commission (TLC) seizes vehicles based on a TLC inspectors' assertion that the vehicle is being employed as an unlicensed taxicab. TLC inspectors act without a warrant, without a pre-seizure hearing, and without judicial imprimatur of any kind. At the *post*-seizure hearing, the inspectors' allegations are often found to be false or baseless. But whether the inspector's allegation is true or false, warrantless seizures violate the Fourth Amendment and the New York Constitution.

At the time their vehicles were seized, none of the plaintiffs, and none of the putative class members, was charged with a crime. The TLC's only claim was that the driver or owner of the vehicle might be liable for a civil penalty, yet un-adjudicated. As it happened, just one of the five named plaintiffs was eventually found liable. But even if the vehicle owner had been found to have violated City law, the TLC is *not* authorized to demand civil forfeiture of the vehicle for such a first offense. Thus plaintiffs' vehicles may not be seized consistent with the Constitution as a prelude to forfeiture. Because neither the civil forfeiture exception nor any other exception to the Fourth Amendment's warrant requirement applies, the TLC's seizures of plaintiffs' vehicles were unconstitutional.

The TLC's seizure policy and practice also violates the Due Process Clause of the Fourteenth Amendment. No judicial process was afforded before the TLC inspectors seized plaintiffs' vehicles. Indeed, the justification for seizing vehicles without warrant or judicial process is the primarily the concern that the car owners may not pay a civil penalty if one is later assessed. But the Due Process Clause does not permit the TLC to seize property to hold it hostage based on speculation that an individual issued a civil notice of violation might not pay a fine yet to be assessed. In addition, in applying this scheme, the TLC has created substantive law

through its adjudicatory process, which is a plain violation of the New York City Administrative Procedure Act (CAPA).

FACTUAL AND REGULATORY BACKGROUND

The TLC seizes roughly 8,000 vehicles annually. In its motion to dismiss, the TLC claims authority to seize vehicles without a warrant from Section 19-506 of the New York City Administrative Code (NYC Code). Indeed, NYC Code § 19-506 (PX 1) permits the City to impose criminal or civil penalties against persons who "operate or permit another to operate" a vehicle as an unlicensed taxi or vehicle for-hire. Section 19-506(b) authorizes the City to prosecute vehicle owners or operators "in the criminal court." But the TLC is itself not authorized to prosecute such criminal actions and, in fact, does not do so. According to TLC reports filed with the City Council, the TLC's unwavering practice is to proceed in accordance with § 19-506(e)(1), which allows the TLC "as an alternative" to seek "a civil penalty" based on a summons "returnable before the commission or an administrative tribunal of the commission." PX 1.[1]

Under this regime, the TLC reports that it seized 7,451 vehicles between the fourth quarter of 2013 and the third quarter of 2014. In the four previous quarters, the total was 8,947. PX 2. In those two years, none of the alleged violations were adjudicated in criminal court. All were adjudicated by the TLC's own tribunal (a/k/a the OATH/TLC Tribunal or TLC Court) which is housed in the same building as the TLC offices in Long Island City and which may impose a fine of $1,500 for a first offense (or $2,000 for a second offense committed within a thirty-six month period). In TLC Court, in contrast to criminal court, respondents have no right to assigned counsel or to a standard of proof of beyond a reasonable doubt. Also, in TLC Court

[1] Plaintiffs' Exhibits are to the Declaration of Daniel Ackman, sworn to January 5, 2015. Defendants' exhibits (DX) are to the Declaration of Karen Selvin, sworn to December 1, 2014.

hearsay is allowed, and other rules of evidence do not apply. OATH Rules of Practice §§ 1-11, 1-46, CAPA § 1046(c). Because hearsay is permitted, TLC inspectors may testify to purported statements made by unnamed passengers who had allegedly hired the car and driver charged by the agency.

In addition to civil penalties, the NYC Code also allows for forfeiture of vehicles by owners, but *only* where owners have been found to have violated § 19-506 *two or more times* within a 36-month period. The TLC is *not* authorized to pursue civil forfeiture for first-time violations of subsections (b)(1) or (b)(2). Because this case involves only alleged *first-time* violators, their cars were not subject to forfeiture. And, in fact, the TLC does not seek forfeiture in such cases.

NYC Code § 19-506(h) also provides for "seizure" of vehicles upon a finding of probable cause, not by a judge, but by "[a]ny officer or employee of the commission designated by the chairperson of the commission [or] any police officer." Applying this provision, TLC inspectors routinely seize the vehicles, including those of alleged first-time violators, and refuse to release them unless the car owner pleads guilty and pays a lesser fine or posts a $2,000 cash bond.

The purpose of these seizures is to secure payment of the fine yet to be assessed. Indeed in the legislative history to Section 19-506 states as much:

> [T]he overwhelming majority of summonses issued for operating without a license have resulted in unsatisfied default judgments. Therefore, in order that the taxi and limousine commission may effectively enforce the vehicle licensing requirements of chapter five of title nineteen of the administrative code of the city of New York, the council hereby provides that the commission shall have the power to seize and subject to forfeiture vehicles operating as taxicabs.

Note 1. Provisions of L.L. 90/1989 § 1, PX 3. Of course, in any given case, the TLC acts without any evidence that the owner or driver will not, in fact, pay the fine if one is imposed.

TLC inspectors issue notices of violation, which order drivers or vehicle owners to appear at the TLC's office in Long Island City if they wish to retrieve their vehicle. Inspectors inform the owners/drivers that they have the option of admitting liability and paying a $600 penalty (substantially less than the statutory minimum fine) plus towing and storage fees, in which case the seized vehicle will be returned. The inspectors also inform them that this "settlement" option is the surest and best way to retrieve the vehicle. Otherwise, the inspectors inform them that they will be given a hearing date, but the car will not be returned unless they post a "bond," that is, $2,000 in cash. If they contest the notice of violation and lose, the inspectors inform them that they will forfeit the $2,000. The inspectors also routinely inform that, even if respondents prevail at the hearing, they will have to apply for a "refund" that will take weeks to process. PX 4; Camacho Decl. ¶ 6; Restrepo Decl. ¶ 3.

Thus, an individual who contests the charges, and who wants the return of his car, will have to pay $2,000 immediately and then, if found not guilty, apply for reimbursement. Beyond the bond, the TLC will not return a seized vehicle to its owner (absent dismissal of all charges) unless the owner pays towing and storage fees of at least $280. Of course, many Americans, indeed probably most, do not have $2,000 in ready funds to post the bond.[2] Thus car owners are

[2] Bankrate.com, reports that 26% of Americans have no emergency savings and another 24% have savings that would cover less than three months of expenses. Bankrate.com, "Financial Security Index: Saving for a rainy day," posted June 23, 2014, available at http://www.bankrate.com/system/util/print.aspx?p=/finance/consumer-index/saving-for-a-rainy-day.aspx&s=br3&c=savings&t=story&e=1&v=1. According to the Federal Reserve, just 39% of the respondents to its survey report having a rainy day fund adequate to cover three months of expenses and only 48% of respondents said that they would completely cover a hypothetical emergency expense costing $400 without selling something or borrowing money. Federal Reserve, "Report on the Economic Well-Being of U.S. Households in 2013," p.3. July 2014, available at http://federalreserve.gov/econresdata/2013-report-economic-well-being-us-households-201407.pdf.

pressed to plead guilty as the fastest and probably the least expensive way to retrieve their vehicles.

TLC inspectors have publicly stated that they are pressured by supervisors to issue summonses and seize vehicles and that, as a result, they often issue notices of violation without adequate evidence.[3] Indeed, in recent months, TLC inspectors have seized a car driven by a volunteer driver for cancer patients.[4] They have seized a vehicle driven by African-American man who was driving his wife, who is white, to work.[5] They have seized the car driven by a Pennsylvania limousine driver, which caused him to lose his job and be stranded at JFK airport.[6] In each of these cases, the charges, while supposedly based on probable cause, were dismissed. Indeed, court files indicate that in well over a thousand cases where drivers were accused of acting for-hire without a license, all charges have been dismissed.[7]

In cases where the owner is not the driver, TLC inspectors rarely, if ever, have probable cause to believe that the owner of the vehicle knowingly permitted the driver to operate it in violation of City law. Despite the absence of a plausible claim of probable cause in such cases, the TLC's policy and practice is to issue notices of violation to the owner, even though he or she is not present at the scene, and even where there is no evidence that he knowingly allowed the driver to act for hire. Harrell Decl. ¶¶ 2-3; PX 5 (Restrepo); PX 10 (Harrell). In order to permit

[3] "Taxi inspector blasts agency for pressure to fine and seize cars without evidence, helps get cases tossed," New York Daily News, Sunday, June 1, 2014.

[4] "Taxi & Limousine agent tries to fine volunteer driver who was transporting cancer patients," New York Daily News, Monday, June 2, 2014.

[5] "Black Man Driving Wife to Work Accused of Being Illegal Cab Driver: Lawsuit," DNA Info, June 11, 2014.

[6] "Driver: The Taxi and Limousine Commission ruined my life," New York Post, Nov. 27, 2014.

[7] "TLC Wrongly Accused Hundreds of Being Illegal Cabbies in Past Year," DNA Info, July 21, 2014; "TLC wrongly took hundreds of cars claimed to be illegal cabs," New York Post, July 22, 2014.

this practice, the TLC Chair has issued decisions on "appeals" (that is an appeal filed by the TLC itself to its own agency head). By these rulings, the TLC chair has held that there is a "rebuttable presumption" that the owner gave the driver permission. *See* TLC v. Allsta Inc. (TLC Chair Dec. March 2013). PX 6. The administrative law judges in OATH's appellate unit have consistently rejected these rulings by the TLC Chair, finding them unjustified by the language of the Administrative Code, and holding that the Chairperson's "presumption" orders are entitled to no deference. *See* TLC v. Angels Limo LLC (TLC Appeal Unit Dec. April 2, 2013), PX 7. Despite the appellate ALJ decisions, the TLC persists in issuing notices of violations to non-driver owners and seizing their vehicles for the payment of un-assessed fines, all without a warrant, without a hearing, and without a tenable claim to probable cause.

TLC inspectors seized the cars of each of the named plaintiffs, though none had previously been found in violation of Section 19-506. In no case did the TLC inspector have a warrant and in every case but one all the underlying charges were ultimately dismissed.

Michael Harrell

TLC inspectors seized Michael Harrell's Mercury sedan on December 18, 2013 when it was being driven by Harrell's friend on Livonia Avenue in the East New York section of Brooklyn. PX 8; Harrell Decl. ¶ 1. While the notice of violation alleges that Harrell "allowed this vehicle to be operated for hire illegally" in violation of NYC Code § 19-506, the inspector who issued the summons had never met or spoke to Harrell and had no basis for making this allegation. Initially, Harrell's stepfather attempted to appear for Harrell in TLC Court on December 23, 2013, Harrell himself being home sick that day. Harrell Decl. ¶ 6. But because Harrell's stepfather is not a lawyer, the TLC ALJ would not let him represent Harrell, and following a "hearing," a default judgment was entered.

On February 12, 2014, Harrell's motion to vacate the default decision was granted, and he was afforded a new hearing date of June 18, 2014. PX 9. Following that hearing, the administrative law judge dismissed the summons, finding that the TLC "did not have any evidence" that Harrell permitted the driver to use the vehicle as a for-hire vehicle, and ruling that the TLC had failed to make even a "prima facie case of the violation." PX 10. When Harrell attempted to retrieve his vehicle, he was informed that it had already been sold. The TLC did not offer any restitution or other financial compensation. Harrell Decl. ¶ 10.

Susan Calvo

Acting without a warrant, TLC inspectors seized Susan Calvo's black GMC SUV, at 7 A.M on June 4, 2014, at JFK Airport, where she was dropping off some friends. DX D (summons and notice of seizure); Calvo Decl. ¶ 1. Calvo, who is handicapped and uses an electric scooter to get around, was approached by a plain-clothes officer. The officer identified himself as part of the New York City Police Department, but was in fact a TLC inspector. The inspector ordered her out of the car and seized it. Calvo was left on the sidewalk without her electric scooter—the inspector refused to let her take it out of the vehicle —or means of transportation home. She ultimately had to call her nephew to drive to JFK and give her a ride home. Calvo Decl. ¶¶ 2-5. In order to retrieve possession of the car, which she did later that day, Calvo paid a $2,000 "bond," that is, a cash payment. Calvo Decl. ¶ 7; DX D (vehicle release). The "vehicle release" document issued to Calvo states that she had "no outstanding judgments on [sic] summonses" issued by the TLC. Calvo appeared for a hearing on June 17, 2014, but was told that there would be no hearing because no charges were pending. Calvo Decl. ¶ 10.

Pedro Camacho

Early in the morning on January 9, 2014, plaintiff Pedro Camacho was driving his Buick Verano at JFK Airport, where he was dropping off his niece, who had been spending the

holidays with the Camacho family in Belleville, NJ. Outside the Jet Blue terminal, Mr. Camacho helped his niece with her luggage, hugged her and watched her as she entered the terminal to catch her flight. Soon after, Camacho was approached by a TLC inspector, who took his car keys, and then entered the terminal, supposedly to interview Camacho's passenger. The inspector issued Camacho a summons, which stated that Camacho had dropped off "1 asian female" and that the female had told the inspector that she had paid $145 for the trip. PX 11. In fact, Camacho's niece is Hispanic, not Asian, had not paid for the trip, and was never in fact questioned by any TLC inspector. Camacho Decl. ¶ 5. The inspector seized the car without a warrant.

Camacho appeared for a hearing on January 21, 2014, having lost the use of his vehicle in the interim. Before the hearing, the inspectors tried to convince Camacho that the best thing for him to do was to pay $600 and plead guilty. Camacho Decl. ¶¶ 6-7. Camacho refused that advice. At the hearing that immediately followed, the TLC withdrew the charges. PX 12. Following the TLC's concession, the vehicle was released. DX B; Camacho Decl.¶¶ 8-9.

John Peters Professional Limousines, Inc.

On December 5, 2013, TLC inspectors seized without a warrant a vehicle owned by plaintiff John Peters Professional Limousines, Inc. (John Peters), a New Jersey corporation engaged in the limousine business. The seizure occurred on the Upper East Side of Manhattan where TLC inspectors issued a notice of violation to the limousine's driver, which cited NYC Code § 19-506. The inspectors issued the summons and proceeded with the seizure despite offers by the driver to provide documentation confirming that the trip began and was to end in Rockland County, a trip for which no TLC license was required. The company was able to retrieve the vehicle on December 9th by posting a cash bond. DX C.

On December 23, 2013, the case was heard in the TLC court and the ALJ dismissed the notice of violation on the ground that, in fact, the trip began and was to end in Rockland County. The ALJ also found "in any event" that "the owner was not aware" of the allegedly unlicensed activity so there was no violation of the rule. DX C (decision). The TLC then appealed, arguing that, among other things, that there is a "rebuttable presumption of owner's permission if unlicensed for-hire activity shown." The TLC appeals unit affirmed, not describing the primary ground for the dismissal, but holding, as many prior appeals unit decisions have held, that "Section 19-506B(1) does not contain a rebuttable presumption." DX C (appeal decision).

Jacklyn Restrepo

TLC inspectors seized Jacklyn Restrepo's Chevrolet Suburban SUV on September 9, 2013, when it was being driven by her boyfriend on Lexington Avenue in Manhattan. PX 13. Both Restrepo and her boyfriend were given summonses citing Section 19-506(b)(1), the boyfriend as the driver and Restrepo as the owner. Restrepo posted a $2,000 cash "bond" to retrieve the vehicle. PX 14. The vehicle release form stated that "the owner has no outstanding judgments on summonses" issued by the TLC. PX 15. At later hearings in TLC Court, both Restrepo and her boyfriend were found not guilty and the summonses were dismissed. PX 5; PX 16.

On July 23, 2014, TLC inspectors again seized Jacklyn Restrepo's vehicle, again with her boyfriend driving it, on Ditmars Boulevard in Queens. Both Restrepo and her boyfriend were issued summonses, the boyfriend as the driver and Restrepo as the owner. PX 17. At a later hearing in the TLC tribunal, Restrepo's boyfriend was found not guilty on the ground that when the inspector pulled him over, the inspector did not have "reasonable suspicion of for hire activity." Also, the boyfriend credibly testified that the passenger in the car at the time was a friend of a friend, and that he was not working for hire. PX 18.

Although the TLC court later found that there was no for-hire activity by the driver, at an earlier hearing, Restrepo was found guilty based on a "presumption" that the vehicle owner allowed the driver to use the vehicle for for-hire activity (which turned out to be non-existent). Though the TLC ALJ found that Restrepo had rebutted the presumption, she "did not do it with substantial evidence." PX 19.

ARGUMENT

I. THE PHYSICAL TAKING OF A VEHICLE IS A SEIZURE, WHICH IS PRESUMPTIVELY UNCONSTITUTIONAL WITHOUT A WARRANT

The Fourth Amendment, made applicable to the States by the Fourteenth Amendment, *Ker v. California,* 374 U.S. 23, 30 (1963), provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The Supreme Court has held that a "seizure" of property "occurs when 'there is some meaningful interference with an individual's possessory interests in that property.'" *Soldal v. Cook County*, 506 U.S. 56, 61 (1992) (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)). The Supreme Court's "cases unmistakably hold that the Amendment protects property as well as privacy." *Soldal*, 506 U.S. at 62. The Fourth Amendment "protects two types of expectations, one involving 'searches,' the other 'seizures.'" *Jacobsen*, 466 U.S. at 113.

Even where the interference with a possessory interest is only for a matter of hours, there has been a Fourth Amendment seizure. *Brendlin v. California*, 551 U.S. 249, 255–257 (2007) (holding that "during a traffic stop an officer seizes everyone in the vehicle, not just the driver"). *Whren v. United States*, 517 U.S. 806, 809 (1996) (brief traffic stop a seizure for Fourth

Amendment purposes); *United States. v. Place*, 462 U.S. 696, 700-01 (1983). That state law may authorize the seizure does not mean it satisfies the Fourth Amendment (or the state constitution). *Knowles v. Iowa*, 525 U.S. 113, 115-16 (1998) (search authorized by Iowa statute held unconstitutional); *Blye v. Globe-Wernicke Realty Co*., 33 N.Y.2d 15, 20-21 (N.Y. 1973) (seizure unconstitutional despite compliance with N.Y. law); *see also People v. Reid*, __ N.Y.__, 2014 WL 7069990 (N.Y. Dec. 16, 2014) (following *Knowles*).

It has long been held that "the Amendment's protection applies in the civil context as well [as the criminal]." *Soldal,* 506 U.S. at 67 (citing cases); *see also United States v. James Daniel Good Real Property*, 510 U.S. 43, 51 (1993). In determining whether there is a seizure implicating the Fourth Amendment, it does not matter that the seizure was conducted for some arguably valid purpose. To the contrary, the Supreme Court has held:

> [T]he reason why an officer might enter a house or effectuate a seizure is wholly irrelevant to the threshold question whether the Amendment applies. What matters is the intrusion on the people's security from governmental interference. Therefore, the right against unreasonable seizures would be no less transgressed if the seizure of [property] was undertaken to collect evidence, verify compliance with a housing regulation, effect an eviction by the police, or on a whim, for no reason at all.

Soldal, 506 U.S. at 69.

Like warrantless searches, a warrantless seizure is presumptively unreasonable. As the Supreme Court stated in *Coolidge v. New Hampshire*, a case involving a murder investigation where the police seized and later searched a vehicle, "[T]he most basic constitutional rule in this area is that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions." 403 U.S. 443, 454-55 (1971) (internal quotations and footnotes omitted); *see also Place,* 462 U.S. at 701 ("In the ordinary case, the Court has viewed a seizure of personal property as per se unreasonable within the meaning of the

Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized); *Arizona v. Gant*, 556 U.S. 332, 338 (2009); *United States v. Casado*, 303 F.3d 440, 443-44 (2d Cir. 2002). *Coolidge* adds: "The exceptions are jealously and carefully drawn, and there must be 'a showing by those who seek exemption … that the exigencies of the situation made that course imperative." 403 U.S. at 455.

II. NONE OF THE ESTABLISHED EXCEPTIONS TO THE WARRANT REQUIREMENT SHIELD THE TLC'S WARRANTLESS SEIZURE REGIME

There are, to be sure, some of what *Coolidge* calls "specifically established and well delineated exceptions" have been applied to the seizure of automobiles. But in their motion to dismiss, defendants do not mention any of them, let alone demonstrate how one applies. Defendants assert instead, and without explanation, that the seizures here are "reasonable," Def. Br. 9, 11, as if there were some free-floating "reasonableness" exception to the warrant requirement. But the law allows no such *ad hoc* immunity. Indeed, just this year, the Supreme Court reiterated the long established rule that "[i]n the absence of a warrant, a search is reasonable only if it falls within a *specific exception* to the warrant requirement." *Riley v. California*, 134 S.Ct. 2473, 2482 (2014) (emphasis added). Automobile exceptions include cases where the driver is incapacitated or under arrest, where the vehicle is carrying contraband or is itself contraband, where it is to be held as evidence of a crime, where it is illegally parked or blocking traffic, or where it is subject to forfeiture. None of these established exceptions, however, apply to the facts of this case. Thus, the TLC's warrantless seizures are indeed in violation of the Fourth Amendment as well as the New York Constitution.

A. None of the Plaintiffs was Incapacitated or Under Arrest

The police may seize without a warrant an automobile being operated by driver who is drunk, under arrest or otherwise incapacitated. *United States v. McKinnon*, 681 F.3d 203, 207-09

(5th Cir. 2012) *cert. denied*, 133 S. Ct. 980 (U.S. 2013) (seizure of car of arrested driver). This practice is authorized by the state's role as "caretaker," that is, the need to remove an arrested or incapacitated driver's car to a safe location for safekeeping. *See United States v. Coccia,* 446 F.3d 233, 238 (1st Cir. 2006). But, as noted, TLC inspectors never arrested any of the plaintiffs in this action and they rarely, if ever, arrest members of the plaintiff class. Thus, the plaintiff drivers were ready and able to drive their cars after being served a summons. Thus, the arrest/incapacity exception to the warrant requirement does not apply. "It is irrelevant that, because probable cause existed, there *could* have been an arrest without a search. A search must be incident to an actual arrest, not just to probable cause that might have led to an arrest, but did not." *Reid*, 2014 WL 7069990; *see also Knowles*, 525 U.S. at 115. Where an authorized person is available to drive the vehicle away legally, impoundment fails to serve a constitutionally legitimate community caretaking objective. *See United States v. Caseres,* 533 F.3d 1064, 1074–75 (9th Cir. 2008); *United States v. Duguay,* 93 F.3d 346, 352 (7th Cir. 1996).

B. None of the Vehicles Were Impeding Traffic or Parked Illegally

The police may, without a warrant, tow (that is, seize) a car that is impeding traffic by being illegally parked. *See, e.g., South Dakota v. Opperman*, 428 U.S. 364 (1976) (allowing inventory search of towed car); *United States v. Rodriguez-Morales*, 929 F.2d 780, 785-86 (1st Cir. 1991). But none of the plaintiffs' cars was parked illegally or otherwise impeding traffic. And in each case a driver authorized to move the vehicle was present and able to do so. Thus, this traffic exception likewise does not apply.

C. There Was no Need to Hold the Cars As Evidence

Courts have allowed the police to seize cars as evidence of a crime, and even to retain those cars, assuming that the cars are genuinely needed as evidence. *Krimstock v. Kelly*, 464 F.3d 246, 251-55 (2d Cir. 2006). But there is no claim here that the plaintiffs' cars were retained as

evidence. Moreover, the types of claims that the TLC makes against owners or drivers are simply not the kind for which the physical vehicles would have any evidentiary value. In any event, none of the seized cars were introduced as evidence in any TLC Court hearing.

D. The Seized Vehicles Were Not Subject to Forfeiture

Courts have allowed warrantless seizures where the vehicle was subject to forfeiture because is it was the instrumentality of a crime, because it contained contraband, or because it was itself contraband. *Florida v. White*, 526 U.S. 559 (1999) (automobile seized as contraband); *Krimstock v. Kelly*, 306 F.3d 40, 44-45 (2d Cir. 2002) (car as instrumentality of crime); *United States v. Gaskin*, 364 F.3d 438, 458 (2d Cir. 2004) (seizure of car used in drug dealing). But in this case, the relevant statute allows for forfeiture only if the owner "is convicted in the criminal court … or found liable … two or more times." NYC Code § 19-506(h)(2). Indeed, the defendants do not claim that the car should be forfeited in the ordinary case. Just the opposite, their practice is to *return* the vehicle upon payment of a bond or payment of a fine, including a reduced fine paid upon a guilty plea. Thus the forfeiture exception to the warrant requirement also has no bearing in this case. As defendants can claim no established exception, the general requirement that the state's seizure of property be justified by a warrant based on probable cause governs here.

III. THE ABSENCE OF A PRE-DEPRIVATION HEARING DENIED DRIVERS DUE PROCESS OF LAW

The TLC's warrantless seizure program, in addition to violating the Fourth Amendment, also denied plaintiffs procedural due process. "Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands. Where such multiple violations are alleged, we are not in the habit of identifying as a preliminary matter the claim's dominant character. Rather, we examine each constitutional provision in turn." *Soldal*,

506 U.S. at 70 (internal citations omitted). When a court is faced with several possible claims on the same set of facts, "[t]he proper question is not which Amendment controls but whether either Amendment is violated." *James Daniel Good*, 510 U.S. at 50.

"Only in a few limited situations has [the Supreme Court] allowed outright seizure without opportunity for a prior hearing." *Fuentes v. Shevin*, 407 U.S. 67, 90 (1972). Seizures in the absence of pre-deprivation fact-finding are permitted only in the face of genuinely exigent circumstances. Absent a true emergency, some fact-finding, and that *by a person or entity other than one effecting the seizure*, must be present to provide a basis for the seizure consistent with due process or a pre-deprivation hearing must be conducted. *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337 (1969).

Sniadach analyzed a Wisconsin statute permitting the garnishment of wages premised solely on a request made to the court clerk. *Id.* at 338. The statute did not require prior notice to the wage earner, but only service of a summons and complaint within ten days *after* service on the garnishee. *Id*. The *Sniadach* Court held that the prejudgment garnishment of wages in the absence of a pre-deprivation hearing, though perhaps justifiable in "extraordinary situations," *id.* at 339, "violate[d] the fundamental principles of due process." *Id.* at 342.

Three years later, in *Fuentes v. Shevin*, 407 U.S. 67, 69 (1972), the Court scrutinized replevin statutes from Pennsylvania and Florida. In those cases, property owners had purchased consumer goods under installment sales contracts, defaulted on those contracts, and then had those goods seized pursuant to writs of replevin without prior notice or hearing. *Id.* at 70–71. Both statutes offered some procedural safeguards limiting the risk of erroneous deprivation, such as a requirement that the person seeking replevin post a bond, that the claimant make at least conclusory allegations to a court clerk showing he is entitled to those specific goods, and the

possibility of suit by the property owner for damages if goods are improperly seized. *Id.* at 83. Finding those safeguards inadequate, *Fuentes* held that the "replevin provisions work a deprivation of property without due process of law insofar as they deny the right to a prior opportunity to be heard before chattels are taken from their possessor." *Id.* at 96.

Since *Fuentes*, the Court has repeatedly rejected statutory schemes that allow for the seizure of property without prior notice and at least some judicial oversight. In *North Georgia Finishing, Inc. v. Di–Chem, Inc*., 419 U.S. 601, 604 (1975), the Court held unconstitutional a Georgia statute that permitted a writ of garnishment based only on a seller's affidavit containing conclusory allegations of money owed where the writ was issued by a court clerk without participation by a judge. More recently, in *Connecticut v. Doehr*, 501 U.S. 1 (1991), the Court invalidated a statute that allowed a tort claimant to attach the defendant's home to secure the potential judgment without prior notice or hearing. Recognizing that the effect of the attachment of real property was not a "complete, physical, or permanent deprivation of real property" and, therefore, "less than the perhaps temporary total deprivation," *id.* at 12, the *Doehr* Court nonetheless held that the effects of the attachment deprived the property owner of a "significant" property interest and violated due process without a pre-deprivation hearing. *Id.* at 11.

Two years later, in *James Daniel Good*, the Supreme Court applied these cases in holding that the federal government's seizure of real property that had been used to commit or facilitate the commission of a federal drug offense violated the Due Process Clause. The Court held that in the absence of exigent circumstances, due process required the government to afford notice and meaningful opportunity to be heard before seizing property subject to civil forfeiture. 510 U.S. at 54. Thus, as noted by the Second Circuit in *Bailey v. Pataki*, 708 F.3d 391 (2d Cir. 2013) the general rule is that a pre-deprivation hearing is required. *Id.* at 401 ("'[W]here the State feasibly

can provide a predeprivation hearing,'" however, "it generally must do so regardless of the adequacy of a postdeprivation ... remedy.") (quoting *Zinermon v. Burch*, 494 U.S. 113, 132 (1990)); *see also Padberg v. McGrath-McKechnie*, 203 F. Supp. 2d 261, 281 (E.D.N.Y. 2002), aff'd 2003 U.S. App. LEXIS 4618 (2d Cir. 2003), cert. denied, 540 U.S. 967 (2003) (holding that suspension of taxi driver licenses, combined with the seizure of taxicabs, without a hearing denied cabdrivers due process). Of course, in this case, the seizures were even less justified: Even after a hearing where a fine was assessed, there would be no right to seize the car if the respondent simply paid the amount due. Thus, applying the Supreme Court's civil seizure cases to the facts presented here, the absence of a pre-deprivation hearing is fatal to the TLC's program.

The interest of the TLC in effecting the seizure is much less significant than the interests of the seizing parties in the cases addressed by the Supreme Court or in *Krimstock*. As is evident from the legislative history of Section 19-506 and from TLC practice, the basic purpose of seizing vehicles of first-time offenders is to assure payment of a fine, which, in may never in fact be imposed. Such a purpose does not meet constitutional scrutiny for seizures in the absence of a pre-deprivation hearing. *See United States v. Vertol H21C*, 545 F.2d 648, 651 (9th Cir. 1976).[8] While a state actor may have some interest in securing payments of fines, that interest nowhere near balances against the interest of the property owner in continued use and enjoyment of their property. As the Supreme Court found in *Doehr*, when there is no identifiable risk of non-payment and the seizure is carried out only to secure un-assessed damages or other penalty, the interest of the seizing the chattel question is limited. *See id.* at 16. And unlike in the cases that do

[8] The considerations may be different when a seizure is to enforce a previously adjudicated debt. *See, e.g., Rackley v. City of New York*, 186 F.Supp.2d 466 (S.D.N.Y. 2002) (seizure of car to satisfy judgment arising from unpaid parking tickets constitutional). In this case, the TLC seized the cars before there was any judgment against the owner or driver.

permit pre-judgment seizure, section 19-506 requires no judicial involvement or review. The TLC acts instead on a probable cause determination made by a TLC inspector in the field. These judgments are often erroneous and, in any event, determinations of this kind have never been held to suffice for the seizure of property in a *civil* case. Thus, the TLC's summary seizure policy is inconsistent with the requirements of due process and is unconstitutional.

IV. WHERE THE OWNER IS NOT THE DRIVER, THE CARS WERE SEIZED WITHOUT EVEN PROBABLE CAUSE

Throughout their motion to dismiss, the defendants rely on the premise that the TLC inspector at the point of seizure is capable of making factual determinations as to a person's compliance with Section 19-506. But non-driver owners, including plaintiffs Harrell, John Peters, and Restrepo, their vehicles were seized without even probable cause to believe that they had violated the ordinance. Seizures under § 19-506(h)(1) are only permitted as means of enforcing § 19-506(b)(1), which speaks to "knowingly operat[ing]" or "permit[ing] another to operate" a vehicle for hire without a license. But to obtain civil penalty against an owner who was not driving the car, there must be probable cause and ultimately proof that the owner gave the driver permission to act for-hire. Where the inspector has never seen or spoken to the owner, he cannot plausibly make that assessment. Accordingly, when the TLC seized these plaintiffs' vehicles, it was effecting a seizure solely for the purpose of securing property to collect a fine that the TLC knew it that the ordinance *would not permit*.

In support of their practice of seizing vehicles of innocent owners, defendants cite a single case, *Bennis v. Michigan*, 516 U.S. 442 (1996). But *Bennis* addressed an *in rem* forfeiture of a vehicle following a criminal *conviction* in which the forfeited vehicle was an instrumentality of the crime. It has no relevance here where: (a) the vehicle is not subject to forfeiture and the state is not claiming the right of forfeiture; (b) where the owner was not convicted (or even

accused) of a crime; and (c) and where and the purpose of the seizure was to assure the TLC of payment of an anticipated, but un-adjudicated, fine.

V. THE CITY'S 'PUBLIC SAFETY' DEFENSE, EVEN IF TRUE, IS NO BAR TO PLAINTIFFS' CONSTITUTIONAL CLAIMS

The defendants also repeatedly point to "public safety" as a general defense to TLC policy. While concerns about public safety may save a statutory scheme from rational basis scrutiny, they are simply irrelevant to a Fourth Amendment (or state law seizure) claim. To begin with, there is no general "public safety" exception to the Due Process Clause. In cases where the danger presented were much more significant than those presented here, courts have found due process protections to be inadequate. *See, e.g., Boumediene v. Bush*, 553 U.S. 733 (2008) (concluding that process afforded accused terrorists had unacceptably high risk of error); *Bailey v. Pataki*, 708 F.3d at 403-04 (vindicating convicted sex offenders' procedural due process right to adversarial hearing prior to involuntary civil commitment). Indeed, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), vindicated the rights of a suspected international terrorist detained at Guantanamo Bay, affirming "[t]he imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies," and noting the "temptation" in times of crisis, "to dispense with guarantees which, it is feared, will inhibit government action.'" *Id.* at 532 (internal quotation omitted).

Moreover, despite the defendants' protestations, the language of, the legislative history preceding, and the actual TLC policy with regard to Section 19-506, all indicate that the purpose and effect of the seizures at issue is to secure payment of fines that may (or may not) become due. The legislative history, cited above, makes this clear:

> [T]he overwhelming majority of summonses issued for operating without a license have resulted in unsatisfied default judgments. Therefore, in order that the taxi and limousine commission may effectively enforce the vehicle licensing requirements of chapter five of title nineteen of the

> administrative code of the city of New York, the council hereby provides that the commission shall have the power to seize and subject to forfeiture vehicles operating as taxicabs.

Note 1. Provisions of L.L. 90/1989 § 1. Section 19-506(h)(1) contains similar language: "The commission shall have the power to promulgate regulations concerning the seizure and release of vehicles and may provide in such regulations for reasonable fees for the removal and storage of such vehicles.… [N]o vehicle seized … shall be released until all fees for removal and storage and the applicable fine or civil penalty have been paid or a bond had been posted."

Where, as here, the "seizing authority … 'has a direct pecuniary interest in the outcome of the proceeding'" constitutional concerns are "heightened." *Krimstock*, 306 F. 3d at 51, (quoting *James Daniel Good Real Prop.*, 510 U.S. at 55-56). No fact better illustrates this point than the TLC practice of allowing owners to retrieve their vehicles *before* their alleged violations are adjudicated by posting a $2,000 cash bond. Releasing vehicles to their owners does nothing to advance public safety. But the posting of a bond that exceeds even the maximum fine secures that the fine, if assessed, will be paid. In sum, the TLC's purported public safety concern is not only irrelevant as a defense to plaintiffs' Fourth Amendment claims, it also plays little or no role in its seizure policy and practice.

VI. THE TLC CHAIR'S CREATION OF A PRESUMPTION OF PERMISSION WITHOUT PUBLIC NOTICE VIOLATES CAPA

Of the named plaintiffs, just Restrepo was found guilty of a Section 19-506 violation. The TLC Court made this finding even though the driver of the car was later found *not* guilty of operating the car for hire. As with most cases involving non-drivers owners, the seizure was made without any plausible finding of probable cause that the owner permitted the vehicle to be used for-hire. And the prosecution of non-driver owners depends on the creation of a "presumption"—as opposed to proof—that the owner permitted the driver to use the vehicle in

that manner. This presumption was created through adjudicatory rulings by the TLC chair, to whom the TLC may appeal rulings by TLC ALJs. In other words, the TLC may appeal rulings by the TLC tribunal to its own chair.

On these appeals, the chair has ruled that there is a "rebuttable presumption" that the owner gave the driver permission. *See* TLC v. Allsta Inc. (TLC Chair Dec. March 2013), PX 6. The ALJs in the TLC appellate unit have consistently rejected these Chair rulings, finding them unjustified by the Code language, and holding that the chair's "presumption" orders were entitled to no deference and that no presumption against the owner applies. *See* TLC v. Angels Limo LLC (TLC Appeal Unit Dec. April 2, 2013), PX 7. Nevertheless, the TLC, through its inspectors, persists in acting on this presumption in seizing cars driven by non-owners.

This rule-making by adjudication is in clear violation of the City Charter. Section 1043(b) of CAPA, part of the City Charter, requires that city agencies publish proposed rules and allow the public to comment before enactment. There is no other way, as the statute plainly provides: "No agency shall adopt a rule except pursuant to this section." § 1043. The notice-and-comment requirement is a central principle of administrative law, articulated not just by the City, but at the federal level in the federal Administrative Procedure Act (see 5 USC § 553 [c]) and at the state level through the New York State Administrative Procedure Act (see SAPA § 202 [5] [b], [c]).

New York Courts have strictly enforced the notice-and-comment requirement, including against the TLC. In *Matter of Miah v Taxi and Limousine Comm. of the City of New York*, 306 A.D.2d 203 (1st Dep't 2003), the TLC purported to change the policy for computing the way "points" would be charged against cabbies pursuant to its persistent violator program. The Appellate Division again held that this "amounted to a rule change requiring compliance by respondent with the public hearing procedures set forth in the New York City Administrative

Procedure Act…. Inasmuch as it is plain that respondent's new rule was not duly adopted in accordance with the procedures set forth in the [CAPA], the revocation of petitioner's taxi driver's license pursuant to that rule was arbitrary and capricious." 306 A.D.2d at 203. In *Matter of Singh v Taxi and Limousine Comm*., the Appellate Division held that the TLC's unannounced change in method for calculating the "grace period" pertaining to license renewals also violated CAPA. 282 A.D. 2d 368 (1st Dep't 2001); *see also Udodenko v. City of New York*, New York Law Journal July 8, 2004 (N.Y. County 2004) (change in policy pertaining to timing of drug tests; resulting suspension and fine voided); *Padberg v. McGrath-McKechnie*, 2006 U.S. Dist. LEXIS 95174 (E.D.N.Y. 2006) (CAPA claims were properly pleaded).

The courts in these TLC cases applied a well-settled principle of New York law. For example, in *Matter of Cordero v. Corbisiero*, 80 N.Y.2d 771 (1992), a jockey had been suspended for violating a racing authority rule while competing at the Saratoga racetrack. The racing board determined that he would have to serve the suspension at Saratoga, rather than at Belmont or Aqueduct. The New York Court of Appeals voided the adjudicatory rule because the such newly announced rule could not be enforced absent notice and comment. In this case, the TLC did not seek to amend the Code and to insert a presumption (which is not discernible in the current statutory language) nor did it act by rule-making. Instead the chair acted alone by an appeal ruling (that is after an appeal *by* the agency *to* the agency chief) which was in defiance of rulings by the agency's own tribunal. That the TLC never attempted to comply with CAPA in creating this presumption of permission voids the chair-crafted rule in force here.

VII. NONE OF DEFENDANTS' REMAINING ARGUMENTS BAR PLAINTIFFS' CLAIMS

Defendants also argue that some of plaintiffs' claims should be dismissed because they fail to allege liability against the municipality as required by *Monell v. Department of Social*

Services of the City of New York, 436 U.S. 658, 694 (1978), or facts sufficient to establish liability against the individual defendants. They add that the individual defendants are entitled to "absolute immunity" or qualified immunity. None of these arguments support dismissal of plaintiffs' amended complaint or bar plaintiffs from seeking relief.

Defendants admit they carried out seizures under NYC Code § 19-506 routinely, indeed thousands of times annually, pursuant to instructions from TLC executives as part of TLC's ordinary practice. Moreover, with regard to non-driver owners whose vehicles are seized, the municipal defendant has not only ordered the practice but it has even created a judicial "presumption" to advance its program. This case is, therefore, not one in which a municipal policy need be inferred, but one in which the injury arose directly from the application of official policy. Such allegations are sufficient to state claims under *Monell. See Okin v. Village of Cornwall-On-Hudson Police Dept.,* 577 F.3d 415, 439-440 (2d Cir. 2009).

Defendants Joshi, Yassky and Scanlon, the current chair of the TLC, the immediate past chair, and the deputy commissioner for enforcement, respectively, are sued in their official capacities as well as their personal capacities under Section 1983. An official may be liable in his or her official capacity regardless of their individual actions based on the liability of the municipality under *Monell*. *See Lore v. City of Syracuse*, 670 F.3d 127, 168 (2d Cir. 2013) (quoting *Kentucky v. Graham*, 473 U.S. 159, 166 (1985)). For these reasons, qualified immunity and absolute immunity are unavailable for the official capacity claims. *See Askins v. Doe*, 727 F.3d 248, 254 (2d Cir. 2013) (no qualified immunity for persons sued in their official capacity); *Graham* at 168 ("The only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, qua entity, may possess, such as the Eleventh Amendment."). Joshi, Yassky and Scanlon are further personally liable under Section 1983 as

each of them knowingly continued the TLC seizure policy challenged here. *See McCann v. Coughlin*, 698 F.2d 112, 125 (2d Cir. 1983) ("[Defendant] Reed may also be fairly viewed as having had at least constructive notice of the practices employed at the correctional center he controlled."); *see also McKenna v. Wright*, 386 F.3d 432, 437 (2d Cir. 2004) (party responsible for prison medical program potentially personally liable). The individual defendants all crafted and implemented agency policy. Yassky, for example, often took personal credit for the TLC practice.[9] Moreover, the constitutional rights violated here arise from law that is decades old. Accordingly, qualified immunity is not available. *See Jackler v. Byrne*, 658 F.3d 225, 243 (2d Cir. 2011) ("Thus, if the law was sufficiently 'clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct.'") (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 819-20 (1982)); *see also Bailey*, 708 F.3d at 404-05. Finally, given that the gravamen of the complaint is the unconstitutional seizure of the vehicles by the TLC inspectors in the field and not the decision to prosecute drivers or owners of violations of Section 19-506 *per se*, the individual defendants are not entitled to absolute immunity under the Supreme Court's "functional" analysis. *See Cornejo v. Bell*, 592 F.3d 121, 128 (2d Cir. 2010) (no absolute immunity for caseworkers who removed children from parents' custody).

[9] *See*, *e.g.*, Taxicab Times, "Commissioner's Corner with NYC TLC's David Yassky," Oct. 25, 2012, available at http://taxicabtimes.com/commissioners-corner-with-nyc-tlcs-david-yassky-p1971-1.htm; New York Times, "In Crackdown on Unlicensed Taxis, City Runs Out of Room," March 19, 2012 ("'We would seize more,' said David S. Yassky, chairman of the Taxi and Limousine Commission, referring to its enforcement officers. 'Day to day, when they are out doing their deployments, their instructions for the mission depend on how much space they have.'").

CONCLUSION

There is no factual dispute that defendants seized plaintiffs' property without a warrant in violation of the Fourth Amendment and without a hearing or any judicial oversight, in violation of the Fifth and Fourteenth Amendments. For the reasons stated, plaintiffs are entitled to summary judgment.

Dated: New York, New York
January 7, 2015

/s/_____

Daniel L. Ackman
222 Broadway, 19th Floor
New York, NY 10038
Tel: (917) 282-8178
d.ackman@comcast.net

Andrew St. Laurent
Harris, O'Brien, St. Laurent & Chaudhry LLP
111 Broadway, Suite 1502
New York, NY 10006
Tel: (646) 248-6010
andrew@harrisobrien.com

Attorneys for Plaintiffs